U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: WAC 08 149 50592 Office: CALIFORNIA SERVICE CENTER Date: DEC 09 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an IT services firm with 100 employees. It seeks to employ the beneficiary as a software engineer pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the labor condition application (LCA) is not valid for the intended location of employment of the beneficiary.

As will be discussed below, the AAO finds that the director's denial of the petition on the basis of the LCA issue addressed in her decision is correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the request for additional evidence (RFE) issued by the director; (3) the petitioner's response to the RFE with supporting documents; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The H-1B petition was received by the California Service Center on April 14, 2008. The Form I-129 lists the intended dates of employment as October 1, 2008 to September 1, 2011. Submitted with the petition was a certified LCA for a software engineer to work either in Bingham Farms, MI, or in Rosemont, IL for a period of employment that covers the dates listed in the I-129. The LCA was certified on March 4, 2008, by the Department of Labor (DOL). In the support letter submitted with the petition, the petitioner listed the job duties of the proffered position as well as the technologies used in the performance of these duties. The petitioner also provided an itinerary stating that the beneficiary would first be assigned to work at a location in Bingham Farms, MI, from October 1, 2008 to January 31, 2010, and would then work at the petitioner's offices in Rosemont, IL from February 1, 2010 to September 1, 2011. The name of the company to which the beneficiary would be assigned in Bingham Farms, MI was not provided.

On July 1, 2008, the director issued an RFE. The RFE requested evidence that the proffered position qualifies as a specialty occupation, including copies of signed contracts between the petitioner and the beneficiary, a complete itinerary that includes the names of the employers where the services will be informed, and copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and any end-client companies where the work will be performed. The RFE specifically stated as follows:

> NOTE: The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing service to other companies may not be sufficient. The evidence must be a clear contractual path shown from the petitioner, through any other consultant or staffing agencies, to and [sic] ultimate end-client.

In the response to the RFE, the petitioner, for the first time, submitted a copy of an Amendment Agreement dated July 1, 2008, between the petitioner and Weber Aircraft LP, located in Gainesville, TX. Along with this agreement, the petitioner submitted copies of a revised work order format, an agreement for direct hiring of resources placed prior to March 2007, and an Agreement for Direct Hiring or Resources Placed on or after

March 1, 2007, dated July 1, 2008. The agreements for direct hiring of resources provide the terms under which Weber Aircraft LP can hire the employees of the petitioner. Nowhere is the beneficiary's name mentioned on these documents. The petitioner also does not provide any explanation of the change in job location, which does not correspond with the information provided in the forms, including the LCA.

The director found that the LCA was not valid for the intended location of employment, noting that:

> [T]he petitioner's "Amendment Agreement" and "Revised Work Order Format" indicate that the beneficiary will be working in Gainesville, Texas – a location that does not appear to be covered by the LCA provided in the record.

In addition, the director cites to 8 C.F.R. § 214.2(h)(4)(i)(B), which, as part of the general requirements for petitions involving a specialty occupation, states that:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

At the time the petition was filed, the petitioner stated that the worksite would be in Bingham Farms, MI, or in Rosemont, IL, and submitted an LCA covering these locations. In response to the RFE, the petitioner submitted documentation that it intended to employ the beneficiary in Gainsville, TX, a location not listed on the LCA, based on a contract with a third-party client that was ratified after the initial petition was filed. Now, on appeal, the petitioner asserts that the beneficiary will work for yet another third-party client, this time at petitioner's offices, based on an unsigned proposal that has been submitted for the first time on appeal.

As a preliminary matter, the AAO notes that the documentation submitted on appeal with regard to the previously identified client will not be considered, as it was encompassed by, but not submitted in reply to, the RFE. *See* the regulation governing the RFE procedures at 8 C.F.R. § 103.2(b)(8).

At the time of filing the petition, the petitioner must file a certified LCA valid for the work location specified in part E of the LCA, and part F for an additional or subsequent work location. The work location is critical in determining the prevailing wage for the occupation in the area of intended employment. *See* 20 C.F.R. §§ 655.730(c)(4) and (d)(1).

The petitioner errs in contending that an H-1B petition may be approved for the employment period for which it is filed, provided that the petition is filed with an LCA certified for the work location(s) known to the petitioner at the time of the petition's filing, and later supplemented with a new LCA, certified for any additional location(s), if circumstances develop requiring the beneficiary to be assigned outside the geographical area(s) specified in the initially filed LCA.

The AAO first notes that the petitioner does not provide any statute, regulation, or precedent decision in support of this contention.

The petitioner's attempt to supplement the petition with an LCA certified after the petition's filing, is precluded by the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified prior to the filing of the petition, with accurate information about where the beneficiary would actually be employed for the employment period specified in the petition. That condition was not satisfied in this proceeding. Therefore, the director's decision will not be disturbed.

Beyond the decision of the director, the AAO also finds that the proffered position does not qualify as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

> *(1)* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> *(2)* The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> *(3)* The employer normally requires a degree or its equivalent for the position; or
>
> *(4)* The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary's services as a software engineer. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's April, 2008 letter of support; and documentation provided in response to the RFE.

The support letter indicates the daily duties of the proffered position include:

- Responsibility for a software development cycle, including design, development, and unit testing'
- Responsibility for requirement gathering, development of new reports, writing functional specification and program specification, technical design, coding reviews and drafting detailed unit test plans;
- Responsibility for running various reports and monitoring process scheduler, implementing password controls;
- Responsibility for creating, planning, designing and execution of test scenarios, test cases, test script procedures and debugging; and
- Responsibility for working with the quality control team during integration testing and resolving any issues uncovered during the debugging process.

The RFE requested additional evidence to establish that the proffered position qualifies as a specialty occupation. As mentioned above, the RFE requested copies of signed contracts, statements of work, work orders, service agreements, and letters with the end-user client, listing the beneficiary by name, that provide a detailed description of the duties the beneficiary will perform.

As described previously, in response to the RFE, the petitioner submitted a copy of an Amendment Agreement dated July 1, 2008, after the petition was filed, between the petitioner and Weber Aircraft LP, located in Gainesville, TX, along with copies of agreements for direct hiring of resources with Weber Aircraft LP. Nowhere is the beneficiary's name mentioned on these documents nor is a detailed description of the duties the beneficiary will perform for Weber Aircraft LP provided.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, a letter is provided from the petitioner dated September 30, 2008 that describes the proposed position for the beneficiary as follows:

> [The beneficiary] will be working on an in-house project for our company at our facility in Rosemont, IL [sic] The in-house project is for Crown Holdings Inc., which

> is a customer of [the petitioner]. Crown Holdings, Inc. is a leading manufacturer of packaging products for consumer marketing companies around the world. They make a wide range of metal packaging for food, beverage, household and personal care and industrial products and metal caps and closures. The name of the project that [the beneficiary] will be working on is Smartline, and involves the rewriting of a proprietary coded application into Open Source Technologies such as Java. The project is expected to take two (2) years to complete and implement, and is anticipated to generate approximately over $350,000.00 in revenue for our company.

Counsel for the petitioner also includes with the appeal a copy of the petitioner's proposal to Crown Holdings, Inc. for Smartline, along with a purchase order, documents that were not provided in response to the RFE.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* In any event, the proposal document and purchase order have little inherent weight because they do not mention the beneficiary's name or the location where the work will take place. Additionally, the proposal is not dated or signed and the purchase order, dated July 18, 2007, had a validity period of only 90 days.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*). Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

The AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum

educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. The AAO therefore finds that there is not sufficient evidence to support a finding that the proffered position is a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.